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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES J. McMANUS, Plaintiff/Appellant, v. TUCSON MEDICAL CENTER FOUNDATION, Defendant/Appellee.	2 CA-CV 2008-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20065575

Honorable Michael O. Miller, Judge

AFFIRMED

James J. McManus — Green Valley
In Propria Persona

Lewis Brisbois Bisgaard & Smith, LLP
By Michael B. Smith — Tucson
Attorneys for Defendant/Appellee

B R A M M E R, Judge.

¶1 Appellant, James McManus, appeals from the trial court's entry of summary judgment in favor of appellee, Tucson Medical Center Foundation (TMC), on his claim that TMC negligently failed to protect him against an unreasonable risk of harm posed by speed bumps on its streets. McManus asserts the trial court erred in granting summary judgment in TMC's favor because a genuine issue of material fact remained regarding whether the speed bumps were open, obvious, and unreasonably dangerous. Finding no error, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. In November 2006, McManus filed a complaint against TMC asserting that, while driving to a doctor's appointment on a private drive owned by TMC, he drove over two speed bumps and suffered a "whiplash injur[y]."[1] McManus claimed his injury was the result of TMC's negligent failure to adequately warn him of or protect him from the speed bumps. Specifically, he asserted the first bump "couldn't be seen because it hadn't been painted in y[ea]rs" and was obscured by shadows, a warning sign was inadequate because it had been placed only two feet in front of the bump and in shade, and there was no other sign warning of the second speed bump.

¶3 TMC moved for summary judgment, arguing that speed bumps are open and obvious and, therefore, property owners have no duty to warn invitees of them. After oral

[1]McManus's complaint also contained claims against Lauri Yablik, Southwest Neuropsychology Association, P.C., and Elsie Vezey. The trial court entered summary judgment against McManus on those claims pursuant to Rules 56 and 54(b), Ariz. R. Civ. P., but that ruling is not the subject of this appeal.

argument, the trial court granted TMC's motion, noting that McManus did "not raise a material issue of fact regarding the open and obvious condition posed by [the] speed bump[s]" or present any admissible evidence supporting his assertions that the bumps were "a defective or otherwise dangerous condition." This appeal followed.

Discussion

¶4 McManus argues the trial court erred in granting summary judgment in TMC's favor because genuine issues of material fact remain as to whether the speed bumps were an open and obvious condition and whether they were unreasonably dangerous. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves,* 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990); Ariz. R. Civ. P. 56(c)(1). Accordingly, a trial court properly grants summary judgment when a party raises no genuine issues of material fact and produces evidence having so little probative value, given the quantum of evidence required, that no reasonable person could find in the party's favor. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We review a trial court's grant of summary judgment de novo and view the facts in the light most favorable to the party against whom judgment was entered. *Simon v. Safeway, Inc.*, 217 Ariz. 330, ¶ 13, 173 P.3d 1031, 1037 (App. 2007).

¶5 As both parties note, property owners have a duty to "use reasonable care to make the[ir] premises safe for use by invitees." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985); *see also Andrews v. Fry's Food Stores*, 160 Ariz. 93, 95, 770

P.2d 397, 399 (App. 1989). That duty includes an obligation to "warn or protect [invitees] against unreasonable risks of harm" on the property. *Bellezzo v. State*, 174 Ariz. 548, 551, 851 P.2d 847, 850 (App. 1992) (emphasis removed); *see also Markowitz*, 146 Ariz. at 355, 706 P.2d at 367. Ordinarily, however, a property owner is not negligent if an invitee is injured as a result of an open and obvious condition on the property. *See Markowitz*, 146 Ariz. at 356, 706 P.2d at 368; *Andrews*, 160 Ariz. at 95, 770 P.2d at 399. This is because "if a condition is open and obvious, and business invitees encountering it can be expected to take perfectly good care of themselves without further precaution, . . . as a matter of law the condition is not unreasonably dangerous." *Flowers v. K-Mart Corp*., 126 Ariz. 495, 498, 616 P.2d 955, 958 (App. 1980).

¶6 Nonetheless, "the bare fact that a condition is open and obvious does not necessarily mean that it is not unreasonably dangerous." *Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982); *see also Andrews*, 160 Ariz. at 95, 770 P.2d at 399. Rather, whether a condition is open and obvious is merely one factor to be considered when determining if the condition is unreasonably dangerous. *See Andrews*, 160 Ariz. at 95, 770 P.2d at 399. "[I]f the proprietor should anticipate the harm from the condition despite its obviousness, he may be liable for physical injury caused by that condition." *Tribe*, 133 Ariz. at 519, 652 P.2d at 1042.

¶7 Whether a property owner has breached its duty of care to an invitee, which includes the determination whether the condition "was dangerous, open and obvious or

whether [the property owner] should have anticipated the harm if open and obvious," is generally a question of fact for the jury. *Tribe*, 133 Ariz. at 519, 652 P.2d at 1042; *see also Flowers*, 126 Ariz. at 497, 616 P.2d at 957. But, "it may be said in some cases as a matter of law that the [property owner's] actions or inactions do not breach the applicable standard of conduct" if reasonable people could reach no other conclusion. *Markowitz*, 146 Ariz. at 357-58, 706 P.2d at 369-70; *see also Flowers*, 126 Ariz. at 497-98, 616 P.2d at 957-58 (affirming summary judgment in favor of parking lot owner when no evidence permitted conclusion parking lot unreasonably dangerous).

¶8 In its motion for summary judgment, TMC acknowledged that McManus was an invitee on its property but asserted it had not breached any duty owed him because the speed bumps on its private drive were open, obvious, and not unreasonably dangerous. In the statement of facts in support of its motion, TMC alleged the speed bumps were "yellow and apparent on the roadway." It further asserted that a sign on the private drive "warn[ed] of speed bumps and the need to drive slowly." These assertions were supported by numerous photographs attached to TMC's statement of facts, depicting yellow speed bumps, a nearby sign with bold lettering warning of the bumps, and several automobiles safely navigating the speed bumps.

¶9 McManus contended in his response to TMC's motion that the speed bumps were not open and obvious and were unreasonably dangerous because the sign and first speed bump "couldn't be seen" due to a shadow that obscured them and because the first bump was

"black" from "tires rolling over it for years." He further contended TMC had painted the speed bumps yellow after his accident.

¶10 But McManus filed no separate statement of facts to controvert TMC's, as required by Rule 56(c)(2). Nor did he attach any supporting documentation to his response to TMC's motion. "When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists." *Kelly v. NationsBanc Mortgage Corp*., 199 Ariz. 284, ¶ 14, 17 P.3d 790, 793 (App. 2000). Bald assertions in a memorandum are not sufficient to create a genuine issue of fact. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 6, 32 P.3d 39, 42 (App. 2001) ("'Generally, the "facts" which the trial court will consider . . . in ruling on a motion for summary judgment are those which are set forth in an affidavit or a deposition; an unsworn and unproven assertion in a memorandum is not such a fact.'"), *quoting Prairie State Bank v. I.R.S.*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987); *Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990) ("When a summary judgment movant makes a *prima facie* motion, the opponent cannot defeat the motion merely by asserting facts in a memorandum or brief.").

¶11 McManus, however, points to a photograph he had attached to his complaint and "incorporate[d] by reference" in his memorandum opposing TMC's motion. This method of setting forth the facts relied upon in opposition to a motion for summary judgment

does not conform to our rules. *See* Ariz. R. Civ. P. 56(c)(2). And, even considering the photograph, McManus fails to raise a question of material fact preventing the entry of judgment in TMC's favor. The photograph McManus submitted merely shows, from an extremely low angle and a substantial distance, shade making both the speed bump and a sign next to it difficult to see. It does not contradict TMC's assertions that the speed bump was yellow and marked by a sign, and McManus offered nothing to support his assertions that the speed bumps were black and had been painted yellow after his accident. *See Tamsen,* 166 Ariz. at 368, 802 P.2d at 1067 (when party opposing summary judgment fails to provide competent evidence controverting facts supporting motion, those facts presumed true). McManus, moreover, cites no authority supporting his assertion that speed bumps, which are common on streets, are not an open and obvious condition. *See Billings v. Wal-Mart Stores, Inc.*, 837 P.2d 932, 932 (Okla. Civ. App. 1992) (speed bump in parking lot open and obvious condition). Regarding McManus's suggestion that his photograph illustrates the speed bumps on TMC's property were not open and obvious because the bumps and sign were shaded by trees, he has cited—and we have found—no authority suggesting transient shade can render an otherwise obvious condition a hidden danger. *Cf. id.* (speed bump obvious condition regardless of color).

¶12 McManus correctly notes that "open and obvious is merely a factor to be taken into consideration in determining if the condition was unreasonably dangerous." *See Andrews*, 160 Ariz. at 95, 770 P.2d at 399. He suggests that, even if the speed bumps were

open and obvious, they nonetheless "presented an unreasonable risk of harm" about which TMC was required to better warn him. Again, other than the photograph showing the speed bumps in shade, McManus fails to offer any evidence supporting his assertion that, despite the bumps' obviousness, invitees could not "be expected to take perfectly good care of themselves without further precaution." *Flowers*, 126 Ariz. at 498, 616 P.2d at 958. He points to an assertion in his response to TMC's motion that an expert witness would testify the sign warning of the speed bumps did not conform to the signage standards adopted by the State of Arizona to warn of road conditions.[2] But McManus's otherwise unsupported statements regarding an expert's potential testimony are hearsay and, therefore, cannot be considered in support of his opposition to TMC's motion. *See Cullison v. City of Peoria*, 120 Ariz. 165, 167, 584 P.2d 1156, 1158 (1978) (hearsay not "competent evidence" capable of creating fact issue preventing summary judgment). McManus submitted no affidavits from the proposed expert or other competent evidence supporting his assertion. *See Tamsen,* 166 Ariz. at 368, 802 P.2d at 1067.

[2]McManus's attempted reliance on appeal on the Arizona Department of Transportation's Manual on Uniform Traffic Control Devices is misplaced. He did not submit the manual to the trial court or rely on it in opposing TMC's motion for summary judgment. "On appeal[] from a summary judgment, 'the parties cannot add exhibits, depositions, or affidavits to support their position nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination.'" *Crook v. Anderson*, 115 Ariz. 402, 403-04, 565 P.2d 908, 909-10 (App. 1977), *quoting* 10 Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 2716.

¶13 In sum, the evidence presented by TMC shows that the speed bumps are painted yellow, a nearby sign warns drivers of their presence, and other drivers readily observe and navigate the speed bumps without further precaution. McManus did not produce any admissible evidence to the contrary. The sole piece of evidence McManus provided to oppose summary judgment is a photograph showing the speed bumps and sign shaded by trees. Given the quantum of evidence required to prevail on his claim and the dearth of competent evidence he produced to support it, we cannot say the trial court erred in implicitly concluding that no reasonable jury could find TMC had breached its duty to protect McManus against an unreasonable risk of harm. *See Orme Sch.*,166 Ariz. at 309, 802 P.2d at 1008; *Flowers*, 126 Ariz. at 497-98, 616 P.2d at 957-58.

Disposition

¶14 For the foregoing reasons, we affirm the trial court's judgment in favor of TMC.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOHN PELANDER, Presiding Judge

PHILIP G. ESPINOSA, Judge